

Conference Paper

The Concept of Pancasila in Guaranteeing the Legal Protection of Indonesian Customary Law Communities

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Abstract.

The existence and rights of indigenous peoples faced several challenges during this time of rapid development. Indigenous and tribal people are weak and marginalized because of these issues. This is due to how differently everyone participates in positions in communities with customary land and customary law in the framework of life in the country and state based on Pancasila and the constitution. The issue raised in this essay is how to provide progressive legal protection for indigenous and tribal peoples' existence, while also achieving their welfare. This essay adopts a conceptual approach, with Pancasila serving as the fundamental principle for ensuring the legal protection of indigenous and tribal populations in Indonesia. This essay also makes use of Customary law communities that are protected by the current legal system, which is more static, constrained, and legalistic than it has ever been. The issue of how communities with customary law are acknowledged must be addressed in terms of legal protection. The state should enact laws and procedures to offer legal defense based on instruction and empowerment. These laws and policies are examples of progressive legal theory; they are founded on Pancasila and the 1945 Constitution, which positions humanity as bringing justice, wealth, and happiness to indigenous and tribal people.

Keywords: Pancasila, Protection, Customary, law

1. INTRODUCTION

Land is very useful for the life of a country. Nurhasan Ismail stated that the position and function of land is very important for human life, namely as a source of human life related to human dignity, welfare and prosperity, power and being close to sacred values. For customary law communities, land has many benefits for their lives. Land is meaningful and very valuable, as wealth and also has a socio-religious function and a source of livelihood. In practice, indigenous peoples do not get the proper existence and protection. Problems with recognition and traditional rights that place indigenous peoples in a weak and marginalized position [1]. This is due to differences in perceptions of related parties. In providing space and place for customary land and customary law

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communities in the context of living as a nation and state based on Pancasila and the constitution.

Different perceptions occur between countries and people who live with their traditional culture, placing customary law as a means of regulation [2]. By Ruwiastuti explained, that the prominent difference is “state legal politics which is progressively oriented, anticipatory towards predictions of future developments and national in scope overcoming cultural groups, so people’s legal awareness on the contrary tends to be traditional, conservative, historically oriented and covers limited cultural areas” [3], [4].

In current legal practice, it is very easy to understand the orientation of determining policies and law enforcement related to various kinds of problems of indigenous and tribal peoples, which apply legal politics determined by the State. So that the problem of legal recognition and protection of indigenous peoples and their traditional rights continues to occur.

Take for example the case of the rights of the Sigapiton Indigenous People who are in The Caldera Resort Lake Toba, where their customary territory has been deprived of problems until now. Starting from their expulsion from their customary territory by the Toba Lake Authority on the grounds that the land is forestry land, to the expulsion carried out by the government.

As a result of the expulsion, the Sigapiton Indigenous People suffered losses, the coffee plantations and corn plantations were leveled to support the development of Lake Toba’s authoritative center in accelerating the development of Lake Toba tourism as a super priority tourism area [5].

So in providing legal protection for indigenous and tribal peoples including their traditional rights, legal practice is needed not only based on the normative text of the law. However, it must be based on the context of the needs of indigenous peoples in essence. Basically, internal law protection means that customary law communities have their own concept of mastery and ownership of their customary (ulayat) lands which are communal, cultural and have a socio-religious character. So the State is expected to provide legal recognition and protection to the existence of indigenous peoples. Recognition and protection should be given based on the text of the law, but also progressive legal protection, which is viewed contextually. This needs to be considered, bearing in mind that the practice of law in Indonesia tends to be more positivistic.

2. METHODOLOGY/ MATERIALS

The method used in this research is normative juridical which is carried out by examining secondary data, both in the form of primary legal materials (primary sources) and secondary legal materials (secondary sources). The primary legal material used is in the form of laws and regulations relating to the issues to be studied. These primary legal materials include the 1945 Constitution of the Republic of Indonesia (UU NRI 1945), Law no. 5 of 1960 concerning Basic Agrarian Regulations (UUPA). While the secondary legal materials used are in the form of books, articles, journals, and research reports related to the problems studied.

3. RESULTS AND DISCUSSIONS

3.1. Legal Protection for Indigenous Peoples Based on Pancasila

Indonesia is a sovereign country that has an ideology as the basis of the state. The nation liberated itself from centuries of colonizing national ideology [6], [7]. During the colonial period, ideology was imbued with all aspects of national life which was very much the opposite of the ideology of the Indonesian nation, including legal life. As a result the basic principles contained in law and law enforcement are far from the values that are adhered to by the Indonesian state. So that independence becomes a way for the nation to carry out the life of the nation and state in accordance with the values contained in the state ideology, namely Pancasila.

Jimly Asshiddiqie explained that State ideology is qualified as an ideology in a neutral sense, namely as a “system of thinking and value system of a group”. Based on this view, it can be said that Pancasila as the nation’s ideology is a system of thinking and values that must be a reference for carrying out the life of the nation and state. Obligations are aimed at all elements of the nation such as the executive, legislative and judiciary, in carrying out their duties and functions as state apparatus, who are obliged to make all policies and decisions based on Pancasila.

In the context of the development of national law, this is closely related to the position of Pancasila as a legal ideal (*rechtsidee*). Sidhartha’s legal ideals are interpreted as “ideas, initiatives, inventions and thoughts regarding law or perceptions about the meaning of law, which in essence consists of three elements, justice, effectiveness (*doelmatigheid*) and legal certainty” [8],[9]. So that in developing national law, namely by providing protection and recognition of the existence of customary law communities,

Pancasila becomes a source of ideas, initiatives and thoughts in interpreting the laws that will be formed and implemented. So that legal protection can provide justice, usefulness and legal certainty for customary law communities. This is referred to by Shidarta with the legal ideals of Pancasila.

The Constitutional Court stated that by saying Pancasila in its position as a *grundnorm*, Pancasila functions as the source of all sources of law, and as a postulate [10]. So that this assumption validates that the values contained in Pancasila are accepted as valid (it is valid because it is presupposed to be valid). Then Pancasila is *a priori* because it has exceeded the position of positive law, so that it cannot be categorized as part of positive law whose values in Pancasila should be used as a determinant of the validity of all positive legal systems or laws and regulations, must be sourced from Pancasila values [11],[12].

The opinion of the Constitutional Court has almost the same meaning as that of Jimly Asshiddiqie [2]. Even though in his view, Jimly stated that the preamble to the 1945 Constitution of the Republic of Indonesia (1945 Constitution) was made a part of the Constitution. However, in essence they have something in common, namely as abstract norms and used as internal standards evaluation of the constitutionality of lower legal norms and used as principles of interpreting the constitution [13]. By giving the position of the preamble to the 1945 Constitution as part of the constitution, what is thus the main ideas contained therein, including Pancasila, can truly become a *rechtsidee* in the development of the Indonesian legal system [14].

Based on this, Pancasila is the source of all sources of law in the development of the national legal system. Because, Pancasila will guide every law formation and guide how the law that is formed is to be implemented. Placement of Pancasila as a legal ideal and position in guiding the formation of laws and regulations is very important. This was stated by Maria Farida by quoting Attamimi that Pancasila along with its five precepts in a position as a guiding star, will positively guide and provide guidance in the formation of laws and regulations and negatively can function as a framework in order to limit the space for substance in statutory regulations. -the invitation.

Based on the guidelines and guidance from the values contained in Pancasila, then various laws and regulations derive the contents of these values. It means what are the ideas, directions of thoughts and views on managing the life of the nation and state, which are contained in various laws and regulations. So do not deviate from the legal ideals that have been outlined in Pancasila. When, the legal order in Indonesia deviates from the order of values contained in Pancasila, by Barda Nawawi Arief [3]. This cannot be said to be a national legal system, even though it was designed by

the legislature as a legislative function. Because it is not oriented to the three pillars or balanced values of Pancasila, namely: Divine values (religious morality), oriented to Human values (humanistic) and oriented to community values (nationalistic, democratic, social justice) [15],[16].

Based on the description above, it is concluded that the idea of providing legal protection includes the recognition of the existence of customary law communities, which originates from Pancasila as the ideals of national law. Based on this rechtsidee, the customary law community, which is part of the elements of the Indonesian nation, has an obligation to recognize and protect its existence. This recognition and protection is to fulfill the values of equality, humanity in the framework of upholding human rights human and social justice. This idea is a priori which constitutes a postulate and is useful as an *ius constituendum* which has an obligation in realizing the *ius constitutum*. However, it must be realized together with the recognition and protection of the law, it is not a deviation from the value of unity as a nation. So the realization of this will add strength to the integration of the Indonesian nation as a plural nation. although the existence of indigenous peoples is sidelined, this can lead to disintegration of the nation by the existence of various horizontal and vertical conflicts.

In addition to laws and regulations, legal protection originates from Pancasila which must be carried out in law enforcement. Law enforcement must also be carried out objectively. However, objectivity is not meant to be objective in the sense that refers to laws and regulations, but more importantly to place objectivity in a sociological and emic perspective. Pancasila in this context has provided guidance and guidance on the embodiment of legal protection for indigenous and tribal peoples.

Guidelines that originate from the precepts that contain basic values as a general principle. So that Pancasila as the basic values that provide legal recognition and protection for the existence of indigenous peoples oriented in humanizing indigenous peoples as creatures of God who have Godly values. Which in turn places customary law communities in an equal position with other communities which is a reflection of the humanistic values contained in Pancasila. So that in the end, these efforts can realize social justice democratically, as the embodiment of societal values.

3.2. Status Quo Of Legal Protection Of Indigenous Communities

After the reform in 1998 in Indonesia, so there was an agreement that in making amendments to the 1945 Constitution of the Republic of Indonesia (1945 Constitution).

So that 4 (four) amendments to the 1945 Constitution were carried out, namely in 1999-2002. According to Jimly Asshidiqqie, that is a consequence of the open ideology embedded in Pancasila, because it provides space and opportunities for the community to reach consensus for the realization of these basic ideals and values, as the pillars of constitutionalism. Agreements regarding legal regulations that form the basis of government or administration of the state (the basis of government) as well as agreements on forming and various institutions and various procedures regarding state administration (the forms of institutions and procedures). These agreements can only be reached if the system developed is a democratic system. One of the results of this agreement is regarding the basis for state administrators who have an attitude towards the existence of indigenous and tribal peoples.

The amendment to the 1945 Constitution was carried out by regulating the provisions of Article 18B paragraph (2), namely, "The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the law. -law". So the constitution, state administrators are obliged to provide recognition of the existence of the customary law community referred to as their traditional rights.

This law is a first step toward giving indigenous peoples and their traditional rights more thorough and contextual legal recognition and protection. include the ownership of any accustomed land therein as well as the right to mastery. Additionally, there is a concern with how well indigenous peoples are recognized and protected. The fulfillment of welfare for indigenous and tribal peoples is complicated by this. Native Americans' existence is recognized via a number of laws and regulations that have been developed as positive law. This acknowledgement, however, is merely a general one [17]. The recognition was given, but no actionable efforts were taken to make it happen. Customary law refers to the acceptance of a community's traditional rights and the existence of such community. This as well as laws that control how indigenous peoples are acknowledged. This acknowledgement, however, is merely a general one. The recognition was given, but no actionable efforts were taken to make it happen. Customary rights are defined as the acceptance of the existence of communities governed by customary law and their traditional rights, and they are governed by Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). According to the provisions of Article 3 of the UUPA, "by bearing in mind the provisions in Articles 1 and 2 of the implementation of customary rights and similar rights of customary law communities, so long as in reality they still exist, they must be in such a way as to suit the national

interests and The state, which must be taken into account when implementing such rights.”

Concerns about the existence of customary rights can be ambiguous when examining these provisions. Because precise guidelines for establishing whether or not customary rights exist have not been included in these clauses. Maria Sumardjono proposed several criteria for determining the existence of customary rights in order to reduce the number of perceptions surrounding this issue, including: “the existence of customary law communities that meet certain characteristics of the subject of customary rights, the existence of land/territory with certain boundaries as lebensraum which is an object of customary rights, and the authority of customary law communities to do so certain actions as described in the customary law communities’ declarations.”

There are currently no further regulations governing customary rights that would make it clearer to recognize customary law community customary rights. According to Boedi Harsono, “Our UUPA and National Land Law do not abolish Ulayat Rights, nor do they regulate them either.” According to him, regulating customary rights can lead to their perpetuation or preservation. In the meantime, community growth reveals a propensity for the abolition of customary rights through a natural process, namely by enhancing individual rights in the relevant customary law community. It is crucial to address this viewpoint in light of the fact that there was a clear signal from the outset that it would be difficult to provide a more representational existence and legal protection. a situation that made the sustainability of customary rights impossible. From a causative standpoint, the refusal to grant legal protection for customary rights indirectly leads to the dissolution of communities that uphold customary law. It should be underlined that the continuation of indigenous peoples’ customary rights is necessary for their way of life to be sustainable. Whereas the community that practices customary law described in the previous sentence is a part of the Indonesian nation and ought to have the same rights and obligations as other citizens. Only formal acknowledgment counts as true recognition; material acknowledgment is not.

Real acknowledgement solely refers to formal recognition, whereas material acknowledgment refers to the content of customary rights and is far more extensive and abstract than firm. Under these circumstances, if there is a conflict between some land rights that have clear and established arrangements and customary lands, this obviously becomes a way for law enforcement to rule out the existence of customary rights (in Benhard Lambong).

Numerous statutes, in addition to the UUPA, govern the acknowledgment of indigenous peoples. In Human Rights Law Number 39 of 1999 (UU HAM). There are similarities

between the provisions of Article 6 paragraph (2) of the Law and Article 28 I paragraph (3) of the 1945 Constitution. The 1945 Constitution was allegedly amended at the same time that the provisions of Article 6 paragraph (2) of the Human Rights Law were established. Taking into account that the 1945 Constitutional Amendment that adds Article 28 I, paragraph 3 (in Kurnia Warman) was passed before the Human Rights Law.

Additionally, this acknowledgement is evident in laws pertaining to forestry, environmental management, and villages, such as Law Number 6 of 2014, Law Number 32 of 2009, and Law Number 41 of 1999. The constitutional court further noted that Arief Hidayat was believed to hold a position as the guardian of both the constitution and Pancasila, the state ideology (the guardian of ideology), in establishing standards for the inclusion of indigenous peoples in decisions. This judgment thus serves as the foundation for the standards for customary law communities' applicants in matters before the Constitutional Court.

Minutes of the Constitutional Court's Decision Number 31/PUU-V/2007, dated 18 June 2008, regarding the review of Law Number 31 of 2007 Concerning the Formation of the City of Tual, state that an indigenous peoples' unit is still *de facto* alive (actual existence). Whether territorial, ancestral, or functional, they must at least meet the following criteria: (i) the presence of a community with in-group feelings; (ii) the presence of customary governance institutions; (iii) the presence of assets and/or customary objects; and (iv) the presence of customary legal norms. The existence of a specific territory is a component (v) that is particularly important for territorial customary law community units [15]. Additionally, the Constitutional Court has rendered judgments in judicial review cases that seem to support the existence of indigenous and tribal peoples. The Constitutional Court's decision with the number 3/PUU-VIII/2010 is one of them. Then, on June 16, 2011, Law Number 27 of 2009, relating to the Management of Coastal Areas and Small Islands, was reviewed then the Constitutional Court's decisions (Decision Numbers 34/PUU-IX/2011 and Decision Number 35/PUU-X/2012) regarding the scrutiny of Law Number 41 of 1999 regarding Forestry. So that in the future progressive legal protection from the government and other law enforcers is required, there are several decisions of the Constitutional Court that are quite progressive in favor of the existence of indigenous and tribal peoples based on the constitution and become the basis for them. Because the national legal system and attitude have historically only been concerned with a legal positivistic mindset, it is vital to modify both for the benefit of the future.

These changes need to be made bearing in mind that the reality and the needs of the community for the realization of justice, prosperity and happiness are very difficult

to materialize using the positivism paradigm which only emphasizes the aspect of legal certainty. then, these changes can be directed by juxtaposing them with a sociological approach. By balancing the sociological approach, in this context, it is understood that there is a fact of life from indigenous peoples and their traditional rights. At least the fact that can be further understood is that indigenous peoples need to guarantee their own existence and their traditional rights in guaranteeing the continuity of life and including their socio-cultural life.

The existence of this assurance promotes prosperity and preserves the continuity of long-standing customs. According to Satjipto Rahardjo, the state should implement the law and be able to bring satisfaction to its citizens. This is what is meant by “progressive law enforcement” at that point. The presence of communities with customary law is acknowledged with conditional acceptance, as may be observed from the requirements of Article 18B paragraph (2) of the 1945 Constitution. This provision contains at least 4 (four) requirements that must be satisfied in order to be recognized, namely that they must still be alive and that their recognition must be in line with social progress, with legal regulations, and with the Unitary State of the Republic of Indonesia [16].

The fourth paragraph of the preamble of the 1945 Constitution’s fourth paragraph, which lists the goals of the State of Indonesia, should not be used to justify conditional recognition. Recognizing indigenous peoples’ existence and respecting their customary rights must therefore be consistent with the objectives of the State. The Pancasila Law State’s implementation is expected to bring about the realization of this. Specifically, by examining the four legal ideals (*rechtsidee*) concepts that Arief Hidayat communicated, namely [17]:

- a. Upholding the ideological and territorial integration of the nation and state.
- b. Acknowledge the people’s sovereignty (democracy) and the rule of law (nomocracy) concurrently and as an integral whole. Realizing social justice and general wellbeing for all Indonesians.
- d. Promoting tolerance in religious life on the foundation of humanism and decorum. Of course, this must be taken into account, keeping in mind that Indonesia is a Pancasila legal state.

By basing its legal system on Pancasila, Indonesia has established itself as a legal state. According to Arief Sidharta, the Pancasila Law Ideal, which is reinforced by national legal principles that operationalize it, served as the foundation for the creation of the national legal system. Universally applicable legal principles, customary law-derived principles, Pancasila-derived principles, and sector-specific technical legal principles are all examples of national legal principles. As a result, the State of Indonesia, which

upholds Pancasila Law, cannot disregard customary law and the ideas it contains. Customary law and Pancasila must become the fundamental concepts and material sources in the context of changing national law, particularly with regard to the recognition and defense of communities that practice customary law and their traditional rights. It is also necessary to state that customary law becomes a legal awareness for communities that practice law.

4. CONCLUSION AND RECOMMENDATION

First, the conclusion is customary law and the principles it contains cannot be disregarded by the State of Indonesia, which supports Pancasila Law. In the context of changing national legislation, customary law and Pancasila must become the primary ideas and material sources, especially with regard to the recognition and defense of communities that practice customary law and their traditional rights. It is also important to note that communities that practice law develop a legal awareness of customary law.

Based on the conclusion the Pancasila Law State idea, which is based on Pancasila and the 1945 Constitution and takes into account the principles of democracy (customary law, religious law, and their sources), as well as the objective of realizing just welfare (social justice) for all Indonesians, is reflected in the progressive legal concept that positions law for humans. In a Pancasila Law State, the rule of law is to create prosperity, justice, and happiness for the people.

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